
TITLE 327 WATER POLLUTION CONTROL BOARD**SECOND NOTICE OF COMMENT PERIOD**

LSA Document #08-210

DEVELOPMENT OF AMENDMENTS TO RULES AT [327 IAC 11](#) CONCERNING STATE ENVIRONMENTAL POLICY**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for amendments to [327 IAC 11](#) concerning implementation of Indiana law regarding environmental impact statements for major state actions that may significantly affect the quality of the human environment. By this notice, IDEM is soliciting public comment on the draft rule language. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

HISTORY

First Notice of Comment Period: April 2, 2008, Indiana Register (DIN: [20080402-IR-327080210FNA](#)).

CITATIONS AFFECTED: [327 IAC 11-1](#); [327 IAC 11-2](#); [327 IAC 11-3](#).

AUTHORITY: [IC 13-12-4](#); [IC 13-14-8](#).

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING**Basic Purpose and Background**

[IC 13-12-4-5](#) requires all state agencies to use a systematic, interdisciplinary approach to ensure integration of natural and social sciences in planning and decision making that may impact the environment. It requires all state agencies to identify and develop methods and procedures that will ensure that unquantified environmental amenities and values be given consideration along with economic and technological considerations in decision making. Each state agency that plans or undertakes a major state action that significantly affects the quality of the environment is required to include a detailed statement by the responsible official that describes the environmental impact, any unavoidable adverse effects to the environment, alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved if the proposed action is implemented. The state agency proposing the action is required to consult with and obtain comments from each state agency that has jurisdiction or has special expertise regarding any potential environmental impact. Copies of the statement and the comments of appropriate federal, state, and local agencies that are authorized to develop and enforce environmental standards shall be made available to the Governor and public and must accompany the proposal through the agency review process.

Under [IC 13-12-4-5](#), the environmental boards are required to define in rules the actions that constitute a major state action significantly affecting the quality of the human environment.

[IC 13-12-4-8](#) exempts state licensing and permitting actions from the requirement to develop an environmental impact statement. [IC 13-12-4-10](#) excludes state agencies that are required to file a federal environmental impact statement under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 et seq. (NEPA) from the state environmental impact statement requirement.

The current rules at [327 IAC 11](#) provide a checklist to aid state agencies in determining whether the state action they are contemplating does in fact significantly affect the environment. The current rules also mirror the statutory requirement that all state agencies prepare environmental impact statements for major state actions. The rules have not been beneficial in helping agencies decide whether the activity they may take is a major state action significantly affecting the quality of the human environment. IDEM wants to make the rules a useful tool for developing environmental impact statements that can aid in the decision making process for major state actions.

The current rules at [327 IAC 11](#) apply specifically to Indiana state agencies that plan or engage in major state actions that may have a significant impact on the environment. Those rules were intended to provide guidance and specificity to state agencies by defining the scope of analysis that a major state action undertaken by that agency must be subjected to. The purpose of this rulemaking is to define "major state action significantly affecting the quality of the human environment".

[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law

The draft rule contains tools for state agencies to use to determine whether their actions rise to the level for which an environmental impact statement must be completed. Actions for which a federally-required environmental impact statement are required are exempt under Indiana law. Indiana law and this draft rule mirror federal NEPA requirements for environmental impact statements. However, the requirement to develop an environmental impact statement for state projects is a requirement imposed under Indiana law, not federal law.

The requirement is a statutory requirement and not a result of this draft rule.

Potential Fiscal Impact

The draft rule does not impose any requirement or restriction on persons to whom the rule applies that is not imposed by statute under [IC 13-12-4](#). The rule does not directly or independently impose a requirement or restriction on any person. Therefore, the rule does not impose any additional fiscal impact. The purpose of the rule is to define "major state action significantly affecting the quality of the human environment", as required by [IC 13-12-4-5](#). The rule also provides tools that affected state agencies can use to comply with the requirements of [IC 13-12-4](#). In accordance with [IC 4-22-2-28](#), this rule is not anticipated to have a total estimated economic impact greater than \$500,000 on all regulated entities.

Public Participation and Workgroup Information

An external workgroup has met to discuss issues involved in this rulemaking and develop the rule amendments. The workgroup is made up of IDEM staff, representatives of the various affected state agencies, and representatives of the environmental community. If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact MaryAnn Stevens, Rules Section, Office of Water Quality at (317) 232-8635 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD

IDEM requested public comment from April 2, 2008, through May 2, 2008, regarding amendments to rules concerning implementation of Indiana law regarding environmental impact statements for major state actions that may significantly affect the quality of the human environment. IDEM received comment letters from the following parties by the comment period deadline:

Improving Kids' Environment (IKE)

Sierra Club Hoosier Chapter (SC)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Indiana's environmental impact review law is based on the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., generally known as NEPA, which was passed in 1969. NEPA was the first major piece of federal environmental legislation. It reflected a recognition that federal agencies, before they took or funded major activities, should consider the potential environmental impacts of those activities and possible alternatives that would lessen those impacts. The law was based on a premise that environmental quality is important to humans and that legitimate public policy goals can be carried out in a way that is protective of environmental quality. The first step to achieving this is for agencies to consider and describe potential environmental impacts as they are planning their projects and activities and making their funding choices, and to do so in a way that allows other agencies and the public to participate in the process. Years after the passage of NEPA and Indiana's law based on it, consideration of potential environmental impacts remains important. (IKE, SC)

Response: IDEM agrees that considering environmental impacts when developing public projects is important and believes that the updated rule will provide a better tool for state agencies to use as they plan.

Comment: Environmental impact statements can be a major benefit in assuring the public that government agencies are giving due consideration to the effects that their actions may have on the environment. It is laudable that the Water Pollution Control Board is willing to review its obligations under [IC 13-12-4-5](#) to define by rule "the actions that constitute a major state action significantly affecting the quality of the human environment" so that government agencies can fulfill their obligations under the law. (SC, IKE)

Response: It has been a number of years since these rules were reviewed, and it is IDEM's hope that the updated rules will provide a better tool for state agencies to use when developing environmental impact statements.

Comment: The workgroup convened by IDEM to discuss the issues involved in this rulemaking should include staff from other government departments whose actions often have environmental impacts so that they may explain any problems that their departments have with the implementation of the existing rules and suggest potential remedies. At a minimum, these other departments should include the Department of Transportation and the Department of Natural Resources. (SC, IKE)

Response: IDEM agrees and has contacted several state agencies about participating in the workgroup and rulemaking process. Currently, both INDOT and IDNR are participating members of the workgroup.

Comment: It could be that the existing rules are adequate and simply need to be implemented in a clear, consistent, and timely fashion so that the departments and the public can rapidly identify which state actions need review and which should move forward promptly. Hopefully, if changes are necessary, the workgroup will be able to agree on these changes amiably without undue discussion and delay in allowing the rulemaking process to proceed. (SC)

Response: The existing rules are set to sunset at the end of 2008. IDEM hopes to have new, updated rules in place by that time or shortly thereafter. The existing rules have not been reviewed for a number of years. Although

this is a somewhat expedited rulemaking process, IDEM believes it is important to have discussions with affected parties during the development of these rules. Thus far, workgroup meetings have been very productive.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

#08-210 (State Environmental Policy)
MaryAnn Stevens
Rules Section
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Mail Code 65-40
Indianapolis, Indiana 46204-2251

Hand delivered comments will be accepted by the receptionist on duty at the twelfth floor reception desk, Office of Water Quality, Indiana Government Center North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana. Comments also may be submitted by facsimile to (317) 232-8406, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Office of Water Quality, Rules Section at (317) 233-8903. Please note it is not necessary to follow a faxed comment letter with a copy of the letter submitted through the postal system.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by November 21, 2008.

Additional information regarding this rulemaking action may be obtained from MaryAnn Stevens, Rules Section, Office of Water Quality, (317) 232-8635 or (800) 451-6027 (in Indiana).

DRAFT RULE

SECTION 1. [327 IAC 11-1-2](#) IS AMENDED TO READ AS FOLLOWS:

[327 IAC 11-1-2](#) Purpose

Authority: [IC 13-12-4](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 2. The purpose of this rule (~~[327 IAC 11-1-1](#)~~) **article** is to:

(1) designate which actions:

(A) are within the scope of [IC 13-1-10-3](#) [IC 13-12-4](#); and in particular which actions

(B) constitute a major state action significantly affecting the quality of the human environment; and to

(2) provide an environmental assessment form to a process that state agencies may use to determine if a specific action is a major state action significantly affecting the quality of the human environment; and

(3) assist state agencies in that determination, carrying out their responsibilities under [IC 13-12-4](#).

(Water Pollution Control Board; [327 IAC 11-1-2](#); filed Sep 24, 1987, 3:00 p.m.: 11 IR 725; readopted filed Jan 10, 2001, 3:23 p.m.: 24 IR 1518)

SECTION 2. [327 IAC 11-1-3](#) IS AMENDED TO READ AS FOLLOWS:

[327 IAC 11-1-3](#) Applicability; exemptions; other requirements not superseded

Authority: [IC 13-12-4](#); [IC 13-14-8](#)

Affected: [IC 13-12-4-8](#)

Sec. 3. (a) This rule (~~[327 IAC 11-1-1](#)~~) **article** applies to all state agencies.

(b) ~~Each agency of the~~ **This article does not supersede or set aside any other:**

(1) **assessment;**

- (2) review; or
(3) determination;

required by federal or state shall comply with this law, rule, ~~(327 IAC 11-1)~~ unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible. **regulation.**

~~(c) IC 13-1-10-7~~ provides that the "(P)olicies and goals set forth in ~~IC 13-1-10-7~~ and this rule ~~(327 IAC 11-1)~~ are supplementary to those set forth in existing authorizations of state agencies." Accordingly, each agency shall interpret the provisions of ~~IC 13-1-10-7~~ and this rule ~~(327 IAC 11-1)~~ as a supplement to its existing authority and as a mandate to view traditional policies in the light of the chapter's ~~(IC 13-1-10)~~ environmental objectives.

~~(d)~~ **(c)** Actions covered include, but are not limited to, **the following:**

- (1) Agency legislative proposals.
- (2) New and continuing projects and program activities directly undertaken by the agency or supported in whole or in part through state contracts, grants, subsidies, loans, or other forms of funding assistance.
- (3) The making, modification, or establishment of rules.

~~(e)~~ **(d)** Actions exempted **are as follow:**

- (1) Administrative procurements, ~~(e.g. for example,~~ general supplies.
- (2) Contracts for consulting services.
- (3) Personnel actions.
- (4) Repair or maintenance of existing structures or facilities involving no expansion.
- (5) Basic data collection, research and experimental management, and resource evaluation activities **which that** do not result in a significant disturbance to the environment.

~~(f)~~ **(e)** Categorical exemptions **include the following:**

(1) Minor actions **including the following:**

(A) Each agency may ~~submit to the department of environmental management for approval~~ **develop** a list of those actions ~~which that~~ it considers to be minor in nature and, therefore, categorically exempted.

(B) Each agency shall provide the following:

(i) Opportunity for IDEM and the governor to comment on the list developed under clause (A).

(ii) Notice to the public of the minor actions list developed under clause (A).

Only those actions on the lists **developed under clause (A)** shall be so exempted.

(2) Emergency actions **including** those actions necessitated by a sudden, unexpected occurrence ~~which that~~ demands immediate action to mitigate loss or damage to:

- (A)** life;
- (B)** health;
- (C)** property; or
- (D)** essential public services;

shall be exempted.

(3) Remediation actions or projects conducted in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR 300, as amended.

~~(g)~~ **(f)** Statutory exemptions **include the following:**

(1) The issuance of a license or permit by any agency of the state, as exempted by ~~IC 13-1-10-6.~~ **IC 13-12-4-8.**

(2) ~~IC 13-1-10-8~~ provides "(A)ny state agency that is required by the National Environmental Policy Act (P.L. 91-190) to file a federal **An action for which an** environmental impact statement shall not be required to file a statement with the state government **or finding of no significant impact was prepared pursuant to the National Environmental Policy Act of 1969,** as provided under sections 3 and 4 (~~IC 13-1-10-3 and IC 13-1-10-4~~) of this chapter, **amended, 42 U.S.C. 4321 et seq. (NEPA),** unless the action contemplated requires state legislation or state appropriations.

(Water Pollution Control Board; [327 IAC 11-1-3](#); filed Sep 24, 1987, 3:00 p.m.: 11 IR 725; readopted filed Jan 10, 2001, 3:23 p.m.: 24 IR 1518)

SECTION 3. [327 IAC 11-1-4](#) IS AMENDED TO READ AS FOLLOWS:

[327 IAC 11-1-4](#) General considerations for preparing environmental assessment forms

Authority: [IC 13-12-4](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 4. (a) ~~It is not within the scope of this rule ([327 IAC 11-1](#)) to identify before the fact which~~ **In accordance with [IC 13-12-4-5](#), each state agency must determine whether an action it is considering constitutes a major state agency action significantly affecting the quality of the human environment. The specific determination must be developed for each agency action by preparation of ~~Such an action requires the completion of an environmental impact statement. The definitions from this rule and the preparation of an environmental assessment as set forth in [327 IAC 11-1-5](#).~~ will aid state agencies in making a determination of the necessity for an environmental impact statement. The department shall develop guidance to further aid state agencies in this assessment, including the following:**

- (1) A state form for an environmental assessment.**
- (2) Guidance on completion of an environmental impact statement.**

(b) **Before developing an environmental impact statement, each responsible official, in preparing the assessment both primary accordance with [IC 13-12-4-5](#), shall consult with and secondary consequences of short term and long term duration should be considered by the obtain comments of each state agency since many state actions stimulate that has jurisdiction by law or induce secondary effects in the form of associated investments special expertise with respect to any environmental impact involved. Copies of the statement and changed patterns of social the comments of the appropriate federal, state, and economic activities. local agencies that are authorized to develop and enforce environmental standards:**

- (1) shall be made available to the governor and the public; and**
- (2) must accompany the proposal through the agency review processes.**

(c) ~~The effect of many state decisions about a project or complex of projects may be individually limited but can be cumulatively considerable in affecting the environment.~~

(d) ~~A proposed action which is likely to be highly controversial from an environmental standpoint should be considered significant justification for preparation of an environmental impact statement.~~

(Water Pollution Control Board; [327 IAC 11-1-4](#); filed Sep 24, 1987, 3:00 p.m.: 11 IR 726; readopted filed Jan 10, 2001, 3:23 p.m.: 24 IR 1518)

SECTION 4. [327 IAC 11-3](#) IS ADDED TO READ AS FOLLOWS:

Rule 3. Definitions

[327 IAC 11-3-1](#) Definitions

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-11-2](#); [IC 13-12-4](#)

Sec. 1. The definitions in [IC 13-11-2](#) apply throughout this article.

(Water Pollution Control Board; [327 IAC 11-3-1](#))

[327 IAC 11-3-2](#) "Department" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-11-2-51](#); [IC 13-12-4](#)

Sec. 2. "Department" has the meaning set forth in [IC 13-11-2-51](#).

(Water Pollution Control Board; [327 IAC 11-3-2](#))

[327 IAC 11-3-3](#) "Environmental assessment" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 3. (a) "Environmental assessment" means a concise public document for which a state agency is responsible that does the following:

- (1) Briefly provides sufficient evidence and analysis for determining whether to prepare:
 - (A) an environmental impact statement; or
 - (B) a finding of no significant impact.
- (2) Aids an agency's compliance with the Environmental Policy Act when no environmental impact statement is necessary.
- (3) Helps the agency to prepare an environmental impact statement when one is necessary.

(b) An environmental assessment includes the following:

- (1) Brief discussions of:
 - (A) the need for the proposed action;
 - (B) alternatives to the proposed action; and
 - (C) environmental impacts of the proposed action and the alternatives.
- (2) A listing of agencies and persons consulted in performing the assessment.

(Water Pollution Control Board; [327 IAC 11-3-3](#))

[327 IAC 11-3-4](#) "Environmental impact statement" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 4. "Environmental impact statement" means the detailed written statement made by the responsible official of a state agency that plans or undertakes a major state action significantly affecting the quality of the human environment that is required by [IC 13-12-4-5](#). The environmental impact statement describes the following:

- (1) The environmental impact of the proposed action.
- (2) Any adverse environmental impact that cannot be avoided should the proposal be implemented.
- (3) Alternatives to the proposed action.
- (4) The relationship between local, short-term uses of the environment and the maintenance and enhancement of long-term productivity.
- (5) Any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented.

The environmental impact statement is prepared after consulting with and obtaining the comment of each state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved.

(Water Pollution Control Board; [327 IAC 11-3-4](#))

[327 IAC 11-3-5](#) "Major state action" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 2-2.1-1](#); [IC 4-22-2](#); [IC 13-12-4](#); [IC 13-14-9](#)

Sec. 5. "Major state action" means any of the following that are planned or undertaken by a state agency:

- (1) Actions, including new and continuing activities, including projects and programs entirely or partly:
 - (A) financed;
 - (B) assisted;
 - (C) implemented;

- (D) conducted;
- (E) regulated; or
- (F) approved;

by state agencies.

(2) Adoption of administrative rules.

(3) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include one (1) or more of the following:

(A) Actions approved by permit or other regulatory decision.

(B) State and state assisted activities.

(4) Proposals for legislation under [IC 2-2.1-1](#).

(Water Pollution Control Board; [327 IAC 11-3-5](#))

[327 IAC 11-3-6](#) "Person" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-11-2-158](#); [IC 13-12-4](#)

Sec. 6. "Person" has the meaning set forth in [IC 13-11-2-158\(a\)](#).

(Water Pollution Control Board; [327 IAC 11-3-6](#))

[327 IAC 11-3-7](#) "Responsible official" or "responsible state official" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 7. "Responsible official" or "responsible state official" means the person established by law as the head of the state agency that plans or undertakes a major state action significantly affecting the quality of the human environment:

(1) who is required to make the environmental impact statement required by [IC 13-12-4](#); or

(2) to whom that responsibility is delegated in writing.

(Water Pollution Control Board; [327 IAC 11-3-7](#))

[327 IAC 11-3-8](#) "Significantly affecting the quality of the human environment" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 8. "Significantly affecting the quality of the human environment" means the following:

(1) In relation to a major state action, an action that, when analyzed according to the context and intensity of the action, has an adverse, rather than beneficial, impact on the natural and physical environment and the relationship of people with that environment.

(2) Impacts may be direct, meaning they occur at the same time and place, or indirect, meaning the impacts caused by the action occur later in time or farther removed in distance, but are still reasonably foreseeable.

(3) The significance of an action may vary with the setting of the proposed action. Both short-term and long-term effects are relevant.

(4) The intensity of an action means the severity of the impact on the environment. Considerations include the following:

(A) The degree to which the proposed action affects human health or safety.

(B) Unique characteristics of the geographic area such as proximity to one (1) or more of the following:

(i) Historic or cultural resources.

(ii) Park lands.

(iii) Prime farmlands.

(iv) Wetlands.

- (v) Karst areas.
- (vi) Other ecologically critical areas, including the habitat of endangered or threatened species.
- (C) The degree to which the action may cause loss or destruction of significant:
 - (i) scientific;
 - (ii) cultural; or
 - (iii) historical;resources.
- (5) Significance cannot be avoided by terming an action temporary or breaking it down into several smaller component actions. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.

(Water Pollution Control Board; [327 IAC 11-3-8](#))

[327 IAC 11-3-9](#) "State agency" defined

Authority: [IC 13-12-4-5](#); [IC 13-14-8](#)

Affected: [IC 13-12-4](#)

Sec. 9. "State agency", as used in this article, means any:

- (1) department;**
- (2) board;**
- (3) commission;**
- (4) bureau; or**
- (5) council;**

created by the legislature having statewide jurisdiction, the operation of which is financed from appropriations of the general assembly. Local government units at the town, city, township, or county level are not included.

(Water Pollution Control Board; [327 IAC 11-3-9](#))

SECTION 5. THE FOLLOWING ARE REPEALED: [327 IAC 11-1-1](#); [327 IAC 11-1-5](#); [327 IAC 11-2](#).

[Notice of Public Hearing](#)

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